No. 14,781

United States
COURT OF APPEALS
for the Ninth Circuit

H. R. OSLUND,

Appellent,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., a corporation,

Appellee.

APPELLEE'S ANSWER BRIEF

Appeal from Final Judgment of the United States District Court for the District of Oregon

HON. WILLIAM G. EAST, Judge.

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ANSWER TO POINT NO. I

The Court properly submitted the within cause to the jury on both questions.

As there was substantial evidence on any issue to be determined, the Court was under a duty to submit such issues to the jury.

United States vs. Bemis, 107 F. 2d 894.

It is obvious under the instructions delivered to the jury by the trial court that there were two questions to be resolved, to-wit: (1) Was there a denial of coverage by the appellee to A. L. Brock? and (2) Was Brock operating the automobile at the time of the accident in the course of his garage business?

An examination of the record of course is necessary to determine the sufficiency of the evidence on these two points. In regard to the coverage question it is the position of the appellee that the testimony of witness Edward I. Engel, an adjuster for the appellee, is sufficient to raise the question as to whether there was in fact a denial of coverage which would excuse performance on the part of Brock in tendering the suit papers to the appellee. The attention of the Court is invited to page 101 of the transcript of record wherein the following testimony appears:

* * * * *

(Edward I. Engel):

"Q. Did you tell Mr. Brink that the State Farm Mutual Insurance Company would not cover Mr. Brock?

A. No."

* * * * *

and on page 102 of the transcript the following testimony appears:

"Q. Now, did, Mr. Engel, ever have a discussion with Mr. Brink—I mean now within two, three, or four months of the time of the accident—did you have any discussion with Mr. Brink as to your authority to either admit or deny coverage under the policy?

A. I advised Mr. Brink immediately that I had

no authority to deny coverage on behalf of the company.

Q. Did you at any time discuss whether the company would—and again I am referring within two, three, or four months after the accident—let's say four months or at any time prior to the trial of the case of Oslund against Brock—did you ever tell him that the company would not cover Mr. Brock under the policy issued to Mr. Lafky?

A. No. No. I never denied coverage on behalf of the company. I attempted to take a—as I recall now I attempted to take a non-waiver agreement from Mr. Brink on our first meeting advising him that there was a policy defense and that the company reserved all rights to investigate the accident and the right to be advised of what was going on."

* * * * *

There is no contention on the part of the appellee that this was the only testimony offered on the question of denial of coverage. It is simply the position of the appellee that there was evidence pertinent to this issue which evidence was substantial and which made out a proper jury question in this regard.

As to the second question, to-wit: Was the motor vehicle at the time of the accident being operated in the course of the garage business of Brock?—the attention of the Court is invited to the following testimony, which is independent of defendant's Exhibit 7 referred to in the appellant's Brief (p. 16 et seq.):

(1) A. L. Brock, the witness called by appellant testified that on the day in question he had the vehicle in his possession because he was going to do a motor tune-up in his shop in Hillsboro (Tr. 31).

(2) Brock also testified that it was a normal and necessary part of the operation of a garage to make a road test of an automobile when such work had been performed on the car (Tr. 37).

(3) Brock further testified that he did in fact make a road test of this vehicle (Tr. 31, 35, 36, 37).

(4) In addition to the foregoing the witness testifed that his own vehicle was available and on the lot on the same day (Tr. 37).

In addition to the direct testimony given, questions were asked based upon prior depositions taken of the witness which cast grave doubt as to whether the road test was made in the morning or at the time of the accident (Tr. 34-37).

After analyzing the testimony of this witness who had been called by the appellant it becomes abundantly clear that the jury could readily infer from all of the testimony that at the time of the accident he was in fact making the trip for a road test and that any other purpose was only incidental. This would be sufficient to sustain the finding by the jury, and would certainly constitute substantial evidence.

The test, as laid down by this Court, appears in the case of United States vs. Bemis, 107 F. 2d 894, 897 wherein Circuit Judge Garrecht made the following statement:

> "* * * It is sufficient for the submission if the evidence be of such a character that reasonable men might reach different conclusions thereon." Cases cited.

Appellee agrees with the theory that the burden vas on the appellee to prove the affirmative defense of on-coverage and submits that the burden was properly arried and that the Court properly instructed the jury n this regard (Tr. 66-69).

There of course is no question of ambiguity in the ontract of insurance; hence, the statement in that re-ard by the appellant is abstract.

We also do not disagree that evidence offered for npeachment should not be used for substantive evi-ence. As is pointed out earlier in this argument, there as substantial evidence on the question of the opera-on of the car in the garage business independent of efendant's Exhibit No. 7. Hence this position of the ppellant also become abstract.

In regard to the cases cited on pages 15 and 16 of ie appellant's brief, the attention of the Court is in-ited to the case of Berry vs. Travelers Ins. Co., 118 . J. L. 571, 194 A. 72. In this case a garage repairman as driving a dairy truck from the diary to the garage inspect and/or repair the vehicle, and also on the ip was delivering ice cream from the dairy to his ster, at which time an accident occurred. In sustain-g the position of the insurer the Court held that this as under the garage exclusion clause.

It should be noted that at no time did the appellant ove the court either orally or by way of requested in-ruction for an order taking away the question of the peration of the vehicle under the garage exclusion pro-

vision. This matter was only brought up subsequent to the entry of the judgment and also upon this appeal.

In considering this assignment of error, it is well to note that the special finding by the jury that the vehicle was being used in the course of the garage operation clearly precludes any further consideration of the question of waiver and the communication of the denial of coverage. The determination that the exclusion applied completely renders moot the secondary question of the right of the appellee to claim the policy defense for failure of the insured to forward the suit papers.

ANSWER TO POINT NO. II

No error was committed by the Court in admitting defendant's Exhibit No. 7.

It appears to be the position of the appellant that the exhibit should not have been received for substantive purposes. With this proposition the appellee has no quarrel; however, there appears to be no dispute between the parties that the same is a proper impeaching document introduced on cross-examination of the witness and germane to a line of direct examination. The statement quoted on page 18 of the appellant's brief of the defense counsel fairly indicates that the purpose of the exhibit was directed to impeachment of the testimony previously given by the witness.

ANSWER TO POINT III

The trial court did not err in submitting the uestion of the garage exclusion operation to the ıry.

Appellee agrees with the appellant that this matter as not properly raised at the trial of the case (App. r., p. 19). There was no request to take the matter om the consideration of the jury or to instruct the ıry specifically on this point. The propriety of the vidence in this regard has been fully discussed, supra, nd further discussion at this point would be merely petitious.

ANSWER TO POINT IV

The court did not err in giving the instruction s complained of by appellant.

It first should be noted that this assignment of error also moot because of the special finding by the jury nat the vehicle was being operated in the course of rock's business as a garage mechanic. However, were nat not the case appellee submits that the instruction not erroneous as claimed by the appellant.

Appellant merely states in his discussion that the ıstruction does not state the law "in that no particular ords are necessary, nor is it necessary the denial be in riting, nor is it necessary that the denial be prior to the ommencement of the suit."

The first part of this complaint appears to be entirely specious because the instruction does not suggest any particular words nor that the denial be in writing. It is apparent that appellant is complaining of the use of the word "definitely" which can only in its fair interpretation can mean "unmistakably." Smith, Administratrix vs. Industrial Hospital Assn., 194 Ore. 525, 536, 242 P. 2d 592. This of course does not preclude any manner of transmission of the denial.

As to what appears to be the last part of this objection it of course was mandatory that the party forward the suit papers to the Company when they were received unless there had been a denial. That, of course, is what the instruction sets forth and certainly no one can complain that this was erroneous.

ANSWER TO POINT V

The court did not err in failing to give the appellant's requested instruction No. I.

The foregoing instruction is patently abstract inasmuch as no question of an ambiguity is presented.

ANSWER TO POINTS VI and VII

Nothing prejudicial occurred due to statement of appellee's counsel (Tr. 26).

It becomes apparent from reading appellant's points VI and VII that they raise essentially the same question, having to do with the statement of defendant's counsel

uring closing argument and having to do with the ourt's action thereafter.

a. This matter must be viewed in several lights, the rst of which is due to the special finding by the jury. he finding was that the automobile was being operated the scope of the garage business, and such finding of ourse renders moot the entire discussion contained in oints VI and VII of appellant's brief. The matters of verage under other policies could have absolutely no earing on the fact as found by the jury in response to e specific interrogatory (Tr. 15).

b. Secondly it should be pointed out in examining oints VI and VII that no action was taken by opposing ounsel other than is shown on page 26 of the transcript testimony. At that time counsel for appellant said don't think there is any evidence in this case about ay policy having lapsed" (Tr. 26).

This is the *sole* action taken by appellant's counsel uring the course of the trial in relation to this matter. ollowing this statement by counsel which hardly rises the dignity of an objection, the court stated and rrectly so that there was some evidence in the case o the effect that Mr. Brock had insurance of his own" r. 26). Inferences could be drawn from this fact.

No objection was taken by appellant's counsel to e court's statement. No request was made by appel- nt's counsel for any further statement by the court that time, nor were any requested instructions sub- itted by appellant's counsel directed to this issue.

Thomson vs. Boles, 123 F. 2d 487, 496; cert. denied 315 U. S. 804, 62 S. Ct. 632, 86 L. Ed. 1204.

It becomes apparent that there then is no issue whatsoever in regard to the statement made by the appellee's counsel. Raising it on the Motion for New Trial and raising it on this appeal manifests that these points are the products of hind-sight intended to correct a result that was not favorable to the appellant.

c. Thirdly, it should be noted that even without the first two points, nothing prejudicial occurred as a result of appellee's counsel's statement. It was an admitted fact in court that there was another policy of insurance covering A. L. Brock and that this policy written by the Girard Insurance Company had also been denied application to Brock for this accident.

Appellant claims that the error herein was in allowing appellee's counsel to argue matters not in issue, i.e. the alleged lapse of insurance, alleged knowledge of Brock that appellee's policy did not cover him, alleged briefing by Brock's attorney before interview by appellee's agent that appellee's policy did not cover him, and implication that Brock was trying to create insurance coverage on the part of appellee where none existed (App. Br. 27). The so-called objection that appellant's counsel made didn't go to these matters saving and excepting an indication by Mr. Gardner that he didn't think there was any evidence in the case about the policy having lapsed; no objection was made as to these other grounds now claimed.

Counsel for the appellee was entitled, as the court dicated, to argue to the jury inferences which might arrived at from the evidence introduced at the time trial, the matters of which appellant now claims were ejudicial were certainly bases for inferences. No preju-ce having resulted to the appellant, no error can or ould now be claimed.

CONCLUSION

Appellee submits that appellant had a fair trial and fair opportunity to present his case. The matter is best mmed up in the words of the trial court as follows:

> "So, I can understand plaintiff is agrieved, but on the other hand all that the Court can say is that it is going to be unjust, any verdict is going to be unjust until the plaintiff prevails, and the Court could not in its conscience make that determination." (Tr. 114)

Respectfully submitted,

VERGEER & SAMUELS

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